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First report on unilateral acts of States

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Introduction

1. The topic of unilateral acts was specifically taken up by the International Law Commission at its forty-eighth session, when it considered its long-term programme of work. On that occasion the Commission concluded that one of the topics that was "appropriate for codification and progressive development" was "unilateral acts of States".[1]

2. The General Assembly subsequently invited the Commission "further to examine the topics 'Diplomatic protection' and 'Unilateral acts of States' and to indicate the scope and the content of the topics in the light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit".[2]

3. At its forty-ninth session, the Commission set up a working group chaired by Mr. Enrique Candioti,[3] which submitted a report that took into account the document prepared by the Commission the previous year.[4] In its 1997 report, the Commission put forward a number of reasons for considering such acts:

> "– In their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community at the present time and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States;
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> – State practice in relation to unilateral legal acts is manifested in many forms and circumstances, has been a subject of study in many legal writings and has been touched upon in some judgments of the International Court of Justice and other international courts; there is thus sufficient material for the Commission to analyse and systematize;
>
> – In the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of acts and what the legal consequences are, with a clear statement of the applicable law."[5]

4. In the preparation of the present report account has been taken of an extensive and not always consistent doctrine relating to international unilateral acts and conduct and international engagements and obligations, with special reference to those of States.

5. Similarly, where appropriate, account has been taken of the background of the topic in the Commission and other international bodies, as well as of the extensive jurisprudence of international judicial bodies that deals in some way or other with the unilateral acts or conduct of a State, whether or not those acts or that conduct belong to the specific category of acts with which we are concerned.

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[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 249. For the Commission's invitation to Governments to express their views on the issue of the inclusion of the topic in its programme of work, see para. 29 of the report.

[2] General Assembly resolution 51/160 of 16 December 1996, para. 13.

[3] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 8 (c) and 193.

[4] Ibid., *Fifty-first Session, Supplement No. 10* (A/51/10), pp. 343-347 (annex II, addendum 3).

[5] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 196.

6. When the articles on the law of treaties were being drafted, it was decided not to include consideration of unilateral acts in the corresponding report. Thus, the Special Rapporteur for the topic, Mr. Brierly, stated in his introductory note in 1950 that:

> "wholly unilateral engagements, engagements to the creation of which only one international legal person is a party, are not within the scope of the present draft. This is not to say that a bi- or multilateral character is thought to be inherent in an international legal obligation *ex contractu*. It is not thought that the doctrine of consideration plays any part in international law. But it is considered that the line between the analogues of the contract and the gift of municipal law, the latter of which is but notionally bilateral, must be drawn somewhere, and that at that line the law of treaties must be taken to stop."[6]

7. When the Commission considered its future organization of work in 1967, reference was made during the relevant discussion to the topic of unilateral acts. In fact, one Commission member commenting on the issue of the sources of international law, stated that:

> "it would be difficult to suggest another source of international law that was as wide in scope [as treaty law]. A limited counterpart to the law of treaties could, however, be found in the topic of unilateral acts, concerning which ample research and practice were available and which greatly needed clarification and systematization. The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation.
>
> "It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations."[7]

8. It is also worth recalling the work of the San Francisco Conference relating to the adoption of Article 102 of the Charter of the United Nations, particularly in connection with the terms "agreement" and "engagement".[8]

9. Generally speaking, the topic of unilateral acts is not new either doctrinally or in terms of international jurisprudence. Important doctrinal works have been published over many decades, but the works produced from the 1960s onwards – when the issue of the definition of an international legal act began to be the subject of more sustained or intense doctrinal study – are better known and more complete.[9] The lack of a theory of international unilateral

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[6] *Yearbook ..., 1950*, vol. II, p. 225, para. 10.

[7] See the statement by Mr. Tammes, *Yearbook ..., 1967*, vol. I, p. 179, para. 6.

[8] "In Article 102 of the Charter the term 'agreement' was expressly adopted 'in preference to the term "engagement" which may fall outside the strict meaning of the word "agreement"'.[4] Nevertheless, the meaning of the term 'agreement' as used in that Article is a wider one than is invariably conceded to the term 'treaty', being expressly declared by Committee IV/2 of the San Francisco Conference to include 'unilateral engagements of an international character which have been accepted by the State in whose favour such an engagement has been entered into'." *Yearbook ..., 1950*, vol. II, p. 226, document A/CN.4/23, para. 16. The note in the text quoted refers to *U.N.C.I.O. Documents*, vol. XIII, p. 705.

[9] See: D. Anzilotti, *Cours du droit international public* (French translation, 1929); Garner, "The International Binding Force of Unilateral Oral Declarations", *American Journal of International Law*, vol. 27 (1933), pp. 493-497; F. Pfluger, *Die einseitigen Rechtsgeschäfte im Völkerrecht* (1936); G. Biscottini, *Contributo alla Teoria degli Atti Unilaterali nel Diritto Internazionale* (1951); Guggenheim, "La Validité et la nullité des actes juridiques internationaux", *Collected Courses of The Hague Academy of International Law*, vol. 74 (1949-I), pp. 191-268; Kiss, "Les Actes unilatéraux dans la pratique française du droit international", *Revue générale de droit international public*, vol. 65 (1961), pp. 317-331; E. Suy, *Les Actes juridiques unilatéraux en droit international public* (1962); Venturini, "La Portée et les effets juridiques des attitudes et des actes unilatéraux des États", *Collected Courses ...*, vol. 112

acts of States is unquestionably a hindrance to any systematic study of the topic. The theory of unilateral acts is, in fact, very far from exhibiting the same consistency as the theory of treaty-based acts.[10]

A. Purpose of the report

10. The aim of the current exercise is, first of all, to identify, by means of consideration of the various acts and forms of conduct of States, the constituent elements of a definition of a unilateral legal act, with a view to drawing up a definition by way of a conclusion. In order to do this, it will be necessary to consider such acts and to endeavour to delimit them precisely so as to exclude those acts that belong to the sphere of the law of international agreements, which is governed by the law of treaties, as codified in 1969.

11. Consideration of unilateral acts of States in the strict sense involves choices that are of fundamental importance for the preparation of the current report, whose aim it is to determine whether a certain category of acts exists in international law and, if so, whether the rules that govern those acts could be the subject of codification and progressive development.

12. The first question that arises with regard to the focus and the orientation of the current report is whether it is necessary to undertake an analysis of the various substantive unilateral acts which States may perform, in order to determine whether they fall within the treaty sphere or within the sphere of strictly unilateral acts, as defined below; or whether, on the other hand, the formal act, which in most cases comprises such a substantive act, should be analysed.

13. Consideration has been given at this preliminary stage to studying both types of acts, that is, both the formal act (the declaration) and its contents, in order to develop a definition of a purely unilateral act and ascertain whether or not the applicable rules can be the subject of codification and progressive development.

(1964-II), pp. 363-467; Quadri, "Cours général de droit international public", *Collected Courses ...*, vol. 113 (1964-III), pp. 237-483; Cahier, "Le Comportement des États comme source de droits et d'obligations", in *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp. 237-265; Miaja de la Muela, "Los Actos Unilaterales en Las Relaciones Internacionales", *Revista Española de Derecho International*, vol. 19 (1967), pp. 429-464; J.-P. Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public* (1972); Degan, "Acte et norme en droit international public", *Collected Courses ...*, vol. 227 (1991-II), pp. 357-418; De Visscher, "Remarques sur l'évolution de la jurisprudence de la Cour internationale de Justice relative au fondement obligatoire de certains actes unilatéraux", in J. Makarczyk, ed., *Études en l'honneur du Juge Manfred Lachs (1984)*, pp. 459-465; Dehaussy, "Les Actes juridiques unilatéraux en droit international public: à propos d'une théorie restrictive", *Journal du droit international*, vol. 92 (1965), pp. 41-66; Degan, "Unilateral Acts as a Source of Particular International Law", *Finnish Yearbook of International Law*, vol. 5 (1994), pp. 149-266; Barberis, "Los Actos Jurídicos Unilaterales como Fuente de Derecho International Público", in *Hacia un nuevo orden internacional y Europeo: Estudios en homenaje al Profesor Don Manuel Diez de Velasco* (1993), pp. 101-116; Charpentier, "Engagements unilatéraux et engagements conventionels: différences et convergences", in J. Makarczyk, ed., *Theory of international law at the threshold of the 21st century: essays in honour of Krzysztof Skubiszewski* (1997), pp. 367-380; Villagrán Kramer, "Les Actes unilatéraux dans le cadre de la jurisprudence internationale", in United Nations, *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (1997), pp. 137-161; and Skubiszewski, "Unilateral Acts of States", in M. Bedjaoui, ed., *International Law: Achievements and prospects* (1991), pp. 221-240.

[10] See Virally, "Panorama du droit international contemporain", *Collected Courses ...*, vol. 183 (1983-V), p. 194.

14. Owing to the importance which is attached to the formal unilateral act, which may comprise various substantive legal acts (promise, recognition, waiver, protest), this report must consider formal unilateral acts comprehensively. The codification and development of rules on the subject dealt with in this report would appear to relate more to the process of creating legal rules, that is, to the formal legal act, though this should not detract from the importance which is to be accorded to the various substantive unilateral acts which a State may perform, as will be seen.

15. The outcome of the Commission's study necessarily remains uncertain. At the current stage, it cannot be determined what form its conclusions will take: that is, whether a doctrinal study, draft articles with commentaries, a set of guidelines or recommendations, or a combination of the above should be prepared on the topic. In any event, owing to the very nature of the subject in question, codification must be accompanied by progressive development of international law (without the specifics of the two processes being entered into). Whatever the case, it is worth recalling the following statement by Mr. Amado in the Sixth Committee of the United Nations General Assembly:

> "... In the present era of rapid changes, codifiers would have to stress the progressive side of their work. The work of codification tended more and more to become one of development."[11]

16. At this preliminary stage, it has been possible to consider State practice only insofar as it is reflected in the relevant jurisprudence and is commented on in major international doctrinal studies; it is to be hoped that comments on that practice will be forthcoming from States for the preparation of future reports. However, account has been taken of the remarks made by the representatives of Governments in the Sixth Committee of the General Assembly in 1997.

17. It is important to note that there is an increasingly pronounced practice on the part of States of performing unilateral political or legal acts, which are often indeterminate, in their foreign relations, and that such acts, based on good faith and on the need to build mutual confidence, appear to be both useful and necessary at a time when international relations are becoming ever more dynamic.

B. Structure of the report

18. In chapter I a brief review is made of the sources of international law and obligations, with a view to drawing a distinction between the process of creating legal rules and the content of those rules, that is, the rules themselves, and focusing the study on consideration of unilateral declarations as a means of creating international obligations, before proceeding to the consideration (also in chapter I) of the various unilateral acts of States that fall within the treaty sphere and which are therefore beyond the scope of the current report.

19. In the law of international agreements, the treaty is the most common procedure for the creation of international legal norms, being based on an agreement, understood as a joining of wills. In the same way, as was stated earlier, in the law of unilateral acts, the unilateral declaration is probably the means or procedure by which a State most often performs unilateral acts and assumes strictly unilateral obligations.

[11] *Official Records of the General Assembly, Sixteenth Session, Sixth Committee, Legal Questions, Summary records of meetings*, 721st meeting, para. 21.

20. The majority of unilateral legal acts of States are in fact only apparently unilateral in nature. In reality, such acts belong to the realm of international agreements, and are therefore governed by existing rules of international law, in particular, the law of treaties, as codified in 1969.

21. Chapter I reviews such acts, in particular those executed under the law of treaties: signature, ratification, reservations, accession, denunciation and acceptance, also interpretative declarations, which, although apparently endowed with greater autonomy, do not in fact enjoy any independent existence as unilateral acts – that is, they do not in and of themselves produce legal effects.

22. Chapter I also deals with acts which, although apparently unilateral, constitute a bilateral or multilateral treaty relationship, such as offer and acceptance, as well as those acts which, although formally unilateral, do not create a new legal relationship but are associated or linked with a pre-existing treaty or customary legal norm.

23. There follows a review of State acts relating to the formation of custom. Independently of whether or not custom has a consensual basis, such acts are not autonomous or isolated in their nature: that is, they do not have any existence of their own. As we shall see, acts which give rise to custom are generally, but not invariably, unilateral acts of States.

24. Chapter I continues with an examination of those acts by which States accept the jurisdiction of the International Court of Justice, pursuant to Article 36 of the Court's Statute, which acts, as we shall see, constitute or give rise to a treaty relationship. It also examines statements made by State officials in the context of judicial proceedings or by the authorities of a State which is a party to such proceedings or which are made outside such proceedings but in relation to them, which acts, as we shall see, can be of a different nature.

25. Chapter I then deals with those unilateral acts whose origin is a treaty: that is, collateral agreements created by stipulations in favour of third parties. Such an act is a treaty act for the States which conclude it, but is a unilateral and heteronormative act from the standpoint of a third State or States for which rights or obligations may arise – a question regulated in the Vienna Convention of 1969.

26. Lastly, chapter I looks at and excludes from the scope of this report all acts and conduct performed by States which permit a third State to invoke an estoppel, since such acts differ, as we shall see, from purely unilateral acts (declarations).[12]

27. Chapter II reviews the criteria which appear to be fundamental in identifying a strictly unilateral act. The first criterion, which is formal in character, allows for the possibility of individual or collective acts on the basis of a single manifestation of will. The second, which concerns the autonomy of the act, must be looked at from two different standpoints, one relating to the absence of a connection with a pre-existing act or norm or other manifestation of will and the other relating to the autonomy of the obligation.

28. Chapter II takes up the question of the basis of the obligatoriness of strictly unilateral acts. It then considers the necessity of providing for a norm on which that obligatoriness might be based.

[12] Jacqué, "À Propos de la promesse unilatérale", in *Mélanges offerts à Paul Reuter, le droit international: unité et diversité* (1981), pp. 335-339.

C. Acts which are excluded from the scope of the study

29. It is necessary in this introduction to exclude from the scope of this study certain unilateral acts: the acts of other subjects of international law, especially those of international organizations, including judicial bodies (authoritative acts); acts which are outside the purview of international law (political acts); wrongful acts and acts which under international law may engage the international responsibility of States, a topic which the Commission is considering separately; and acts and conduct, such as silence and acquiescence, which, irrespective of whether they are legal acts or forms of expression of the will of States, are not purely unilateral in nature.

1. Unilateral legal acts of international organizations

30. Insofar as unilateral legal acts of international organizations are concerned – a subject which will have to be taken up separately owing to the importance of such acts in international life – it should be stated first of all that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights".[13]

31. It is true that the unilateral acts of States and of international organizations could be placed in the same category, as the International Law Commission affirmed in 1971 when considering its long-term programme of work.[14]

32. It is important, however, to draw a distinction between unilateral acts in the context of relationships of coordination and unilateral acts in the context of relationships of association. Such a distinction is fundamental because relationships of coordination are based on the sovereignty and juridical equality of States. As we shall see later, this fact points to the conclusion that unilateral acts which are performed in this context cannot generate obligations for third States. The situation with respect to relationships of association is different. The decisions of an international body can produce legal effects insofar as the member States, in the exercise of their sovereignty, may have endowed that body with legal competence.

33. It is the prevailing view that the two categories of acts should be studied separately, and this on various grounds. As was pointed out by a representative in the Sixth Committee, the study of unilateral acts of States necessarily implies the exclusion of acts performed by international organizations.[15] Acts performed by international organizations are also substantially different from the acts of States.[16] Although it is true that the acts of international organizations are of particular interest, they should be considered separately because of their differences, especially with regard to the means of their elaboration or formulation.[17]

34. In the case of States, the rules relating to the performance of such acts have their basis in the constitutional norms of the State concerned and in international law. In the case of

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[13] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 178.

[14] In 1971 the International Law Commission, when considering its long-term programme of work, stated that, since the definition of a unilateral act included the unilateral acts of all subjects of international law, it might be deemed to include the performance of such acts not only by States but also by international organizations possessed of a distinct legal personality. *Yearbook ..., 1971*, vol. II (Part Two), p. 61, para. 282.

[15] Statement by the representative of France, A/C.6/52/SR.19, para. 60.

[16] Statement by the representative of Austria, A/C.6/52/SR.23, para. 44.

[17] Statement by the representative of Venezuela, A/C.6/52/SR.21, para. 39.

international organizations, on the other hand, the rules which regulate this question appear to be contained in the basic texts of the organization and the instruments derived from those texts and, where applicable, in international law.

35. Although it is true that unilateral acts performed by an organ of an international organization or by an international organization as such may have legal force and hence may contain obligations for third parties, the rules which apply to those acts must be distinguished from those which may apply to unilateral acts of States.

36. Accordingly, the Commission might consider, as suggested in the discussion in the Sixth Committee in 1997, the possibility of carrying out a further specific study which could perhaps complement the proposed study on unilateral acts of States.[18]

37. Although important differences exist between them, the acts of international organizations should be taken to include authoritative acts, in particular, those emanating from judicial bodies, which acts, though they are unilateral in form and heteronormative in their effects, do not belong to the category of strictly unilateral acts.[19] Part of the legal literature considers that they are not legal acts at all inasmuch as the will which underlies them does not belong to a subject of international law. Today, on the other hand, a substantial body of opinion maintains that the acts of international tribunals are indeed legal acts inasmuch as such tribunals are international bodies empowered by international law to settle legal disputes.[20]

38. In all such cases, the unilateral acts concerned are performed as a result of the competence which States themselves have conferred on the body and of which they may become the object. Unilateral authoritative acts, which continue to be important in international law, are regulated by the law peculiar to each international organization or body. The rules applicable to the treaties which authorize such bodies to perform such acts are regulated, of course, by the law of international agreements, in particular, the law of treaties.

2. Political acts and legal acts of States

39. It is moreover desirable in this introduction to separate the legal acts of States from their political acts.

40. A representative speaking in the Sixth Committee at the most recent session of the General Assembly stated that the Commission should distinguish unilateral acts of States which are intended to produce legal effects opposable under international law from other such acts. Noting that the effect of the former was to create, recognize, safeguard or modify rights, obligations or legal situations, he asked what the point was of the latter.[21]

41. In point of fact, a State can perform acts of either a political or a legal nature – a difficult and complex distinction which defies any clear-cut classification. A formally political act adopted in a formally political context may be purely political; that is to say, it may contain intentions or desires in relation to another State in a purely political context. But nothing in international law appears to preclude an act of this nature from producing legal effects at the international level and hence from being regulated by international law.

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[18] Statement by the representative of China, A/C.6/52/SR.23, para. 9.

[19] See Jacqué, op. cit. (*supra* note 9), pp. 345-417.

[20] See Salvioli, "Les Règles générales du droit de la paix", *Collected Courses* ..., vol. 46 (1933-IV), p. 82. See also Degan, loc. cit. (*supra* note 9), p. 374.

[21] Statement by the representative of France, A/C.6/52/SR.19, para. 59.

42. A legal act differs from a political act by its very nature: that is, by virtue of its scope, its effects and the mechanism for ensuring compliance by the States which are bound by it.

43. A political act can be defined as an act which a State performs with the intention of creating a political relationship with another State and which exists outside the legal sphere. The basis of its obligatoriness appears to reside in morality and politics, rather than in international law. Its performance and the sanction for non-compliance therefore depend entirely on the political will of the State which performs it. As regards the obligation to comply with the engagement to which such an act gives rise, good faith has a role to play as a basis of its obligatoriness. However, as this question is not of direct concern to the topic under consideration, it will not be dealt with here. Of course, such acts have to be looked at in a different light. As Virally rightly says, "il semble que les accords purement politiques comportent, très généralement, une extension, qui peut être considérable par rapport à ce qu'admet le droit international, de l'application de la réserve *rebus sic stantibus* et de l'état de nécessité"[22] [it seems that purely political agreements very often involve an extension – which can be considerable compared to what is acceptable in international law – of the application of the *clausula rebus sic stantibus* and of the doctrine of state of necessity]. In addition, the performance of the obligations to which these acts give rise and the sanction for failure to perform those obligations would not appear to be regulated by international law. One of the important consequences of the distinction between the political engagement and the legal engagement is the hypothesis of their non-performance. At this critical moment, as Virally notes, the separation of types becomes necessary: the State complaining of the situation may certainly act in the political sphere if a political agreement has been breached but cannot do so in the legal sphere. If the breach pertains to a legal commitment, on the other hand, both options are available.[23]

44. The intention of the State which formulates or issues a declaration is what really must determine its legal or political character: in other words, whether that State intends to enter into a legal engagement or a political engagement. State practice appears to indicate that in their international relations States formulate purely political unilateral or bilateral declarations without any intention of entering into legal engagements. In such cases it may be said that the acts performed are not without their social effect.

45. Admittedly, the political act produces important effects in the sphere of international relations. By making engagements on this level States may assume political obligations which, although they are outside the realm of international law, are nonetheless of fundamental importance in relations between States. As State practice bears out, the obligatoriness of a political engagement is at times far more effective and consequential than that of a legal engagement.

46. Such acts have a paralegal importance, to which part of the literature has accorded a fundamental value as a source for regulating the conduct of States in their international relations. However, they are of no importance to the topic under consideration, except insofar as an act of this nature may contain legal elements which can be translated into legal norms, especially into obligations for the issuing State.

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[22] "La Distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique: Rapport provisoire", *Annuaire de L'Institut de Droit International*, vol. 60-I (1983), p. 236, para. 167.

[23] Loc. cit. (preceding note), pp. 230-233, paras. 151-159.

3. Acts relating to the international responsibility of States

47. This introduction must also exclude acts contrary to international law and acts which, although in conformity with international law, may engage the international responsibility of a State, since the Commission is already dealing with these topics separately.

4. Acts and conduct which do not constitute international legal acts in the strict sense of the term

48. A State may engage in conduct and perform a series of acts of various kinds which define its participation in the international sphere. Such conduct and such acts are not always clear-cut and unambiguous in nature and are far from being capable of classification in a convenient and definitive form. Accordingly, assessing them and determining the rules which apply to them give rise to serious difficulties.

49. By its inaction, a State may acquire rights and assume obligations. In particular, through silence – which for some writers is not strictly speaking a legal act but is rather a form of expression of will – a State may acquire rights and assume obligations in specific cases. A State may accept an offer through silence: *qui tacet consentire videtur*. The mere manner in which a State conducts itself, including in specific circumstances its silence, may indicate the will to recognize as legitimate a particular state of affairs.[24] The State may also express by its silence its opposition to a de facto or *de jure* situation: *qui tacet negat*.

50. According to much of the literature, silence, as a reactive behaviour and a unilateral form of expression of will, cannot be considered a legal act. Aside from this argument, however, silence, in spite of being unilateral, is not an act or an autonomous manifestation of will, and it certainly cannot constitute a formal unilateral legal act in the sense that is of interest to this report. It seems difficult to equate silence with a formal declaration and to apply to it specific rules different from those established in relation to the law of treaties.

51. Moreover, silence and acquiescence bear a close relationship to estoppel, as will be seen later when the question of declarations which in one way or another oblige the State to maintain a specific pattern of conduct is considered.

52. There appears to be no need to mention notification, though it is a unilateral act. Despite its unilateral character from the formal point of view, notification, irrespective of whether or not it is a legal act, does not produce effects per se, being connected to a pre-existing act; that is to say, it is not an autonomous act in the sense that is of concern to us.

53. Notification is an act of will by which a third party is made aware of a fact, a situation, an action or a document capable of producing legal effects and therefore to be considered as legally known by the party to which it was addressed.[25]

54. At times obligatory, notification is not a legal act in the strict sense, since it creates neither rights nor obligations except insofar as it relates to the fulfilment of a previously assumed obligation, as, for instance, in the case of the mandatory notification provided for in the Act of Berlin of 26 February 1885, the London declaration relating to maritime warfare of 26 February 1929, and the Antarctic Treaty of 1 December 1959.

55. Lastly, it is desirable to separate out various forms of State conduct which, although not formulated with the intention of producing legal effects, may nevertheless engage or commit a State. International jurisprudence has on various occasions considered conduct

[24] Anzilotti, op. cit. (*supra* note 9), p. 535.

[25] C. Rousseau, *Droit International Public, Tome I, Introduction et Sources* (1970), p. 421.

of this kind, which is not intended to create specific legal effects.[26] The basis of such conduct, it should be stated, is not the unequivocal intention to engage or commit oneself. Legal acts, on the other hand, have as their basis the clear-cut and unequivocal intention to produce specific legal effects and hence can be excluded from the purview of this report.

56. This first report is admittedly of limited scope. However, it is the view of the Special Rapporteur that, without a definition based on a strict delimitation of unilateral acts, it is impossible to undertake the study of rules which might be the subject of codification and progressive development, especially those relating to the elaboration, validity, interpretation and effects of unilateral acts (following to an extent the methodology adopted by the International Law Commission in its consideration of the topic of the law of treaties).

57. The importance of the content of the act, that is, the substantive act, should not be overlooked. However, the formal legal act which is the basis of this report and which would be the focus of any effort to codify and develop applicable rules, is the declaration, by which a State may assume strictly unilateral legal obligations.

58. This first report is necessarily of a preliminary nature. Its main purpose is to stimulate discussion on the topic within the Commission.

I. The existence of unilateral acts of States

59. A State can, in accordance with international law, assume engagements and acquire legal obligations at the international level through the expression of its will. Just as a State can undertake international engagements and acquire rights and obligations at that level under treaties, it can also act and undertake engagements unilaterally, in exercise of the power of auto-limitation which is conferred on it by international law. That a State can, over and above its treaty obligations, commit itself unilaterally, is well recognized today, both in the case law (*Nuclear Tests* cases) and in the doctrine (Suy, Venturini, Rubin, Jacqué and Sicault).[27]

60. As indicated above, there is no doubt that formal unilateral acts of States exist in international law. As also indicated, the majority of such acts fall within the sphere of treaty relations. Others, however, may be understood to fall outside that sphere and so to require specific rules to govern their operation.

61. There is no doubt that the international social environment is constantly changing, which means that international law is also constantly developing in order to adapt to these changes and, in a more progressive light, to facilitate necessary changes in the social environment. The rise of new types of relationships, and of instruments to create them makes it necessary to refer, at least in a summary way, to the new sources of international law and obligations. These new phenomena should accordingly be studied and clarified with a view to regulating the conduct of the subjects of international law and helping to promote stability and security in the relationships between them by continually developing the international legal system.

62. The first section of this chapter examines the sources of international law and the sources of international obligations, in an effort to isolate and examine more closely the

[26] See: *Shufeldt*, United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1079; *Affaire de l'indemnité russe*, ibid., vol. XI, p. 421; and *Kunkel et al.* c. *État polonais*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les Traités de paix*, vol. VI (1927), p. 974. See also: Venturini, loc. cit. (*supra* note 9); and Cahier, loc. cit. (*supra* note 9).

[27] See Charpentier, loc. cit. (*supra* note 9).

unilateral declaration as a formal act and as a source of international obligations. Next, various unilateral acts of States are examined in an effort to determine whether they should be placed within the realm of treaty relations or whether, alternatively, they can be included within the sphere of the law of unilateral acts.

A. Sources of international law and sources of international obligations

63. In an effort to systematize the study of unilateral acts of States and to undertake the study of the rules applicable to their operation, the Special Rapporteur has come to the conclusion that the most important legal act is the strictly unilateral declaration embodying unilateral obligations. As stated above, this does not preclude study of the content of such obligations, which may be either a promise, renunciation or recognition and which may not always necessarily be unilateral in the strict sense dealt with here.

64. However, it is first of all necessary to refer, if only briefly, to the sources of international law and international obligations. This is without doubt a necessary prerequisite for determining the existence of strictly unilateral acts.

65. Formal sources of international law are methods or procedures for elaborating international law and international norms. A clear distinction should be drawn between such procedures and methods and the content of the resulting instrument. Hence, in the field of treaties, it is important to distinguish between the *procedure* for elaborating a treaty and the *agreement* which is concluded and which is reflected in the instrument, which can embody legal norms, that is, rights and obligations for the States participating in their elaboration. In the same way, in the context of unilateral acts of States in general, it is important to distinguish between the *declaration*, as a *procedure* for creating legal norms, and its *content* or *substance*.

66. Article 38 of the Statute of the International Court of Justice – an illustrative, non-restrictive provision – sets out the main formal sources of international law (international treaties and custom), subsidiary sources (general principles of law), auxiliary sources (doctrine and case law) and an additional source, equity *ex aequo et bono*, if the parties to a trial before the Court agree to its use.

67. However, there are or can be other sources. The fact that they are not mentioned in Article 38 cannot in itself preclude their treatment as such. Two other sources are frequently utilized: unilateral acts and the resolutions of international organizations.[28]

68. It is well known that Article 38, which sets forth the law applicable by the Court, may rightly be criticized, both for what it says, because of its flawed drafting and its ambiguous content, and for what it does not say,[29] failing, as it does, to mention, *inter alia*, unilateral acts and resolutions of international organizations (the latter also being unilateral acts, although on this the doctrine is not unanimous).

69. Legal acts, that is, acts performed with the intent to produce effects in international law, are the main source of obligations in international law.[30] A State can incur obligations through formal acts which are not necessarily sources of international law, within the

[28] Abi-Saab, "Les Sources du droit international: essai de déconstruction", in M. Rama-Montaldo, ed., *El Derecho Internacional en un Mundo en Transformacion: Liber Amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga* (1994), p. 36.

[29] Abi-Saab, loc. cit. (preceding note), p. 33.

[30] Reuter, "Principes de droit international public", *Collected Courses* ..., vol. 103 (1961-II), p. 531.

meaning referred to in Article 38 of the Statute of the International Court of Justice, already discussed briefly here.

70. Article 38 of the Court's Statute does not mention unilateral acts of States among the sources of law that it lists. That, however, does not mean that such acts cannot give rise to international legal norms.[31]

71. Differentiating formal sources from sources of obligations could help to distinguish acts which are unilateral in their form from those which are unilateral in their effects. Not all formal unilateral acts fall within the realm of treaties. Some of them, albeit not very many, can, as the doctrine by and large indicates, be classified as strictly unilateral acts.

B. Declarations as procedures for creating legal norms and as a source of international obligations

72. Generally speaking, there seems to be no doubt that, by means of a declaration, a State can perform an act on the international plane with the intent to produce legal effects. Practice bears witness to unilateral declarations which, independently of their form or of whether or not they fall within the realm of treaties, may contain a renunciation, recognition, protest or promise.

73. The most common formal unilateral act of a State is a declaration.[32] It is difficult in practice to find substantive unilateral acts that are not expressed or embodied in a declaration. It is therefore necessary to examine this act, by which a State may attempt to create or produce legal effects in the international sphere, without, of course, ruling out the possibility that a State might perform a substantive act through some other type of formal act, as would be the case, for example, with an act of recognition accomplished through a series of conclusive acts.[33]

74. The distinction between an act and a norm, and the distinction, within the latter, between rights and obligations, seems useful for the purposes of this first report. These distinctions are not just theoretical. The difference between a treaty mechanism or operation and a unilateral mechanism (declaration) makes it possible to differentiate an act from its result, that is, from the norm it embodies.[34]

75. The difference between a treaty and a norm that derives from that treaty becomes apparent, at least in practice, in the context of the application (with their consent) of treaties to third parties which have not participated in their elaboration, likewise in any consideration of the question of nullity, which differs depending on whether it is a matter of the nullity of the formal act (defects of consent, etc.) or of the norm which it contains (where that norm is contrary, for example, to a norm of peremptory law). The importance of such a distinction is thus clear.

76. From the formal viewpoint, a declaration can be a unilateral act by a State which can have a legal content. A declaration can therefore be a way of creating legal norms on the international plane whose content and likewise whose effects can be varied.

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[31] Virally, "Los Fuentes de Derecho Internacional", in M. Sørensen, ed., *Manual of Public International Law* (Spanish translation, 1971), p. 154.

[32] Skubiszewski, loc. cit. (*supra* note 9), p. 233.

[33] A State can implicitly recognize another State by concluding a treaty with that State, which it had hitherto not recognized.

[34] P. Reuter, *Introduction to the Law of Treaties* (2nd ed., 1995), pp. 21-23.

77. A declaration, considered in a purely legal context, can be written or oral; it can be unilateral, bilateral or multilateral.

78. Among the many written declarations which occur in international practice are the following: declarations whereby a State protests against, renounces or recognizes a right or a situation of fact or promises to conduct itself in a certain way in the future; declarations whereby a State undertakes a commitment to one or more other States or to the international community as a whole; written declarations addressed by States to the Secretary-General of the United Nations accepting the jurisdiction of the International Court of Justice on the basis of Article 36, paragraph 2, of its Statute; unilateral declarations deposited by Member States pursuant to resolutions of the United Nations General Assembly or of other international bodies;[35] declarations made by States in other contexts;[36] and written declarations annexed to international instruments.[37] This diversity of content complicates study of the subject but at the same time demonstrates that, rather than substance, it is the declaration as a formal legal act that should be the subject of consideration, particularly in the context of the codification and development of the law on the operation of unilateral acts.

79. Although they may be more relevant to treaty law, contemporary practice reveals an ever-greater abundance of joint declarations which are issued at the conclusion of official visits at the highest level. These even occur within the framework of international organizations, an example being the statement of the President of the Security Council on behalf of the States members of the Council on the occasion of its meeting held at the level of heads of State and Government, on 31 January 1992.[38] While they are bilateral or multilateral in form and are often of a political nature, these declarations could be relevant to the acts which are the subject of the current study, inasmuch as they can produce unilateral legal effects in relation to third States, that is, when such declarations have a heteronormative character.

80. First, we must see whether, from the formal point of view, declarations as formal unilateral acts can or cannot constitute a source of international law, that is, whether they can or cannot be considered an autonomous source of law.

81. Much of the doctrine concludes that unilateral act of States do not constitute a source of law. That does not mean, however, that a State cannot create international law through its unilateral acts. Some of these acts can give rise to rights, duties or legal relationships, but they do not, because of that fact, constitute a source of international law.[39] Unilateral acts are sources of international obligations.[40]

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[35] For example, in accordance with General Assembly resolution 32/64 of 8 December 1977, entitled "Unilateral declarations by Member States against torture and other cruel, inhuman or degrading forms of punishment".

[36] For example, the Declaration made by the Government of Egypt on the Suez Canal and the arrangements for its operation, done at Cairo on 24 April 1957, whereby the Government of Egypt undertook to respect the obligations flowing from the Constantinople Convention of 1888. United Nations, *Treaty Series*, vol. 265, p. 299.

[37] Such as the one examined by the Permanent Court in the *Eastern Carelia* case, namely, the Declaration of the Russian Delegation annexed to the Treaty of Dorpat, concluded between Finland and Russia on 14 October 1920, regarding the autonomy of Eastern Carelia; *Status of Eastern Carelia, P.C.I.J.*, Series B, No. 5, pp. 20-22.

[38] See document S/23500.

[39] Skubiszewski, loc. cit. (*supra* note 9), pp. 221-222.

[40] M. Bos, *A Methodology of International Law* (1984), p. 89.

82. International tribunals have not taken a position on the question of whether unilateral acts are a source of international law; they have confined themselves to specifying that such acts are a source of international obligations.[41] The Court, in its decisions of 20 December 1974 in the *Nuclear Tests* cases, stated that "[it] is well recognized that declarations made by way of unilateral acts ... may have the effect of creating legal obligations".[42] This would appear to confirm that the Court, without pronouncing on the existence of a source of international law, effectively concluded that unilateral acts formulated by means of a declaration may constitute a source of international obligations.

83. In this context, note may be made of joint declarations which establish a unilateral relationship with another State or States and which, although they are adopted in a political context and do not have a clearly legal form, contain unilateral obligations which are binding upon the States which are parties to them. This is the case, for example, with the joint declaration by the Presidents of Venezuela and Mexico, issued at San José, Costa Rica, on 3 August 1980[43] in which they agreed on an energy cooperation programme for the countries of Central America and the Caribbean, assuming certain obligations, which could be regarded as legal in nature, for the benefit of third States which had not participated in the formulation of the declaration. The legal nature of the obligations in question may be inferred from the fact that they were subsequently carried out by the two countries and were later reaffirmed by means of declarations with the same content.[44]

84. In addition to written declarations, practice demonstrates the existence and importance of oral declarations, regardless of whether they have legal force or fall within the treaty sphere.

85. The form of a declaration does not seem to be a determining factor in establishing its validity. In his dissenting opinion in the *Legal Status of Eastern Greenland* case, Judge Anzilotti said, "there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid".[45] In the *Nuclear Tests* cases, the International Court of Justice indicated in this respect that:

> "With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:
>
> > "'Where ... as is generally the case in international law, which places the principal emphasis on the intention of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.' (*I.C.J. Reports 1961*, p. 31)

[41] Villagrán Kramer, loc. cit. (*supra* note 9), p. 139.

[42] *Nuclear Tests* case (Australia v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 253, para. 43.

[43] *Libro Amarillo de la República de Venezuela* (Caracas, Ministry of Foreign Affairs, 1980), pp. 751-753.

[44] *Libro Amarillo de la República de Venezuela* (Caracas, Ministry of Foreign Affairs, 1983), pp. 872-873.

[45] *Legal Status of Eastern Greenland, P.C.I.J.*, Series A/B, No. 53, p. 91.

"The Court further stated in the same case: '... the sole relevant question is whether the language employed in any given declaration does reveal a clear intention ...' (ibid., p. 32)."[46]

The form, as Sørensen notes, is of interest only to prove the declaration of intent.[47]

86. Unilateral declarations in general can be legally binding on a State, if that is the intention of the State and if the declaration is formulated in accordance with international law. This was not accepted in the jurisprudence prior to the *Legal Status of Eastern Greenland* case, as is borne out by the decision of 10 January 1927 of the Hungarian-Romanian mixed tribunal, in the *Kulin* case.[48] In the *Island of Lamu* case, it should be added the arbitrator considered the oral declarations of the Sultan of Zanzibar and, while recognizing the existence of a promise, concluded that the declarations were not binding because they had not been accepted by the other party, that is to say, because they did not form part of a treaty-based relationship.[49]

87. The binding nature of oral declarations was subsequently confirmed by the Permanent Court of International Justice and by the International Court of Justice.[50]

88. In the case of the celebrated Ihlen declaration, which was oral in nature, though confirmed in writing, the Permanent Court recognized that there had been an engagement and that Norway was therefore legally bound – although, it must be admitted, it also recognized that the declaration concerned fell within the treaty sphere.[51] The Court considered that "it [was] beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government ... is binding upon the country to which the Minister belongs".[52] From the foregoing it may be concluded that the declaration by the Norwegian Minister for Foreign Affairs constituted an international engagement comprising an obligation that was binding on the declarant State, regardless of whether it formed part of a treaty-based relationship or had an independent existence, and that it produced legal effects by and of itself – a point on which there exist various positions among the authors.

89. In the *Nuclear Tests* cases, the Court, after considering the oral declarations which were made to the media (press and television) by the French authorities (the President of the Republic and the Minister of Defence), recognized that these declarations could have the effect of creating legal obligations, if that had been the intention of the State, and that this "[was] to be ascertained by interpretation of the act".[53] A declaration may be a source of obligation, depending on the intention of the State formulating it and on its content.

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[46] Loc. cit. (*supra* note 42), para. 45.

[47] Sørensen, "Principes de droit international public", *Collected Courses* ..., vol. 101 (1960-III), p. 54.

[48] *Emeric Kulin père. État roumain, Recueil des décisions des Tribunaux arbitraux mixtes institués par les Traités de paix*, vol. 7 (1928), p. 138.

[49] J. B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, vol. 5 (1898), p. 4940.

[50] *The Mavrommatis Jerusalem Concessions (P.C.I.J.*, Series A, No. 5, p. 37); *Case concerning certain German Interests in Polish Upper Silesia (The Merits), (P.C.I.J.*, Series A, No. 7, p. 13); *Legal Status of Eastern Greenland* (loc. cit. (*supra* note 45), p. 71); *Case of the Free Zones of Upper Savoy and the District of Gex (P.C.I.J.*, Series A/B, No. 46, pp. 170-172); and *Nuclear Tests* cases (loc. cit. (*supra* note 42)).

[51] Legal theory, however, is not unanimous in this respect. Guggenheim regarded the declaration as treaty-based (*Traité de Droit International Public, avec mention de la pratique internationale et suisse*, vol. I (2nd ed., 1967), p. 138), while Rousseau regarded it as unilateral (op. cit. (*supra* note 25), p. 419).

[52] *Legal Status of Eastern Greenland*, loc. cit. (*supra* note 45), p. 71.

[53] Loc. cit. (*supra* note 42), para. 44.

90. However, declarations, especially legal declarations, may be valid only if they are formulated in accordance with certain rules governing their formulation. Although it is not appropriate to elaborate on the point here, these rules to a large extent exhibit significant parallels with the rules of the law of treaties.

91. Declarations vary in their content, as has already been indicated. A declaration which contains a renunciation, a recognition, or a promise is undoubtedly a unilateral act from the point of view of form. With regard to its effects, the act concerned may be treaty-based, if the declaration relates to a treaty or a pre-existing norm or if it depends on the existence of another act; or it may be unilateral, if it has independent existence, that is, if it can produce effects in and of itself. In the latter case it is possible to identify the non-treaty-based promise which a strictly unilateral legal act of a State may be, if it is considered that the declaration by which it is formulated is autonomous in the sense that will be seen below, when the criteria for the identification of strictly unilateral acts are considered.

92. There is no doubt that it is difficult to determine whether a declaration which contains one of the substantive acts already mentioned is an act which falls within the treaty sphere or within the realm of strictly unilateral acts of a State.

93. At the practical level, what is of interest is the interpretation which may be given to a declaration in terms of specifying the point at which it becomes binding upon the declarant State, that is, whether that occurs when a third State accepts the obligation undertaken by the declarant State or at the time when that latter State performs the act or makes the declaration; this is fundamental for determining the applicable law. In the first case, as will be seen, the judge will have to consider the act or conduct of the third State, while, in the second, he or she will have to approach the declaration as an act which is creative of a new legal relationship, particularly of obligations binding on the declarant State.

C. The various substantive unilateral legal acts of States

94. This section is concerned with a category of unilateral acts of States which fall within the treaty sphere, putting to one side for the moment typical unilateral acts of States of a substantive nature, such as recognition, promise, renunciation or protest, which do not necessarily fall within that domain and which, consequently, are relevant to the study of strictly unilateral acts.

95. No reference is made in this context to legal acts deriving from actions such as occupation, which, while it may be regarded as an action which produces legal effects, is not formulated by means of a legal act as such, although a later declaration, which would fall within another category of acts, such as notification, may be made by the State which carried out the action.

96. States carry out a number of acts which may be regarded as falling within the treaty sphere, such as: (a) acts linked to the law of treaties; (b) acts related to the formation of custom; (c) acts which constitute the exercise of a power granted by a provision of a treaty or by a rule of customary law; (d) acts of domestic scope which do not have effects at the international level; (e) acts which form part of a treaty-based relationship, such as offer and acceptance; (f) acts relating to the recognition of the compulsory jurisdiction of the International Court of Justice, in accordance with Article 36 of its Statute; (g) acts which are of treaty origin but which are unilateral in form in relation to third States; and (h) acts performed in connection with proceedings before an international judicial body and acts which may enable a State to invoke an estoppel in a trial.

97. Acts of signature, ratification and deposit of an instrument of ratification, denunciation, suspension, termination and accession, and acts by means of which a State formulates a reservation are legal acts which are unilateral in form but in respect of which it may be affirmed without difficulty and without the need for further comment, that they fall within the sphere of the law of treaties as such.

98. The signing of a treaty is a formal unilateral act by means of which a State consents to accept the negotiated text in whose formulation it participated. Its legal effect is undeniable since the State accepts the engagements which have been undertaken and which it may later ratify (except in the case of treaties of immediate implementation, which do not require confirmation by the State – a question which is governed by the Constitution of the signatory State). Ratification is an act envisaged in a pre-existing text, whereby a State confirms its intention of being bound by that text, as negotiated and signed. The deposit of the instrument of ratification is not a legal act per se; it is similar to notification in that it involves an act which does not create a legal relationship but forms part of the process whereby a State makes an engagement at the international level. The same comment may be made about accession, denunciation and the formulation of reservations, whether expressly or tacitly permitted by the treaty.

99. With regard to interpretive declarations, the situation might be thought to be different, since such declarations are formulated regardless of whether they are permitted by the treaty, either expressly or tacitly. For some, these declarations may be considered to belong to an intermediate area,[54] between reservations and unilateral acts. Although this issue is important, it may be concluded that such declarations cannot be regarded as autonomous either, that is, they do not have a separate existence and do not produce effects in and of themselves, and should therefore be regarded as forming part of a treaty-based relationship.

100. Secondly, consideration should be given to acts and conduct which contribute to the formation of international custom. It is well known that the customary process is not complete unless two elements are brought together: the repeated performance of acts known as precedents (the material element or *consuetudo*) and the feeling or belief of subjects of law that the performance of such acts is obligatory because the law requires it – hence the concept of a psychological element or recourse to the Latin formula *opinio juris sive necessitatis*.[55]

101. There would seem to be no doubt about the importance of unilateral acts of States in the formation of custom. This may be seen in the case of acts related to the law of the sea performed since the eighteenth century which later made possible the codification of international rules on the subject.[56]

102. The State, through its acts or conduct, can participate in or hamper the formation of a customary rule. Recognition express of tacit (that is, silence or lack of protest, which is tantamount to tacit or implied consent), and protest or rejection play a determining role in the formation of custom. What is involved, from the formal standpoint, are unilateral acts, or, in any case, expressions of will which are connected with the belief that a practice is law. It is worth pointing out, however, that custom, as acknowledged by a part of

[54] See the statement by the representative of Slovenia in the Sixth Committee, A/C.6/52/SR.23, para. 19.

[55] D. Nguyen Quoc, P. Daillier and A. Pellet, *Droit international public* (5th ed., 1994), p. 323.

[56] V. D. Degan, *Sources of International Law* (1997), p. 253.

international doctrine[57] and jurisprudence,[58] can have its origins in various acts such as treaties, that is, in legal acts of a treaty nature, as the International Law Commission pointed out in 1950,[59] although such acts might be unilateral from the point of view of the process of custom-formation.

103. As one author indicates, unilateral acts are never initial acts in the formation of custom. They are, rather, responses to some other, pre-existing act. The primary importance of such acts resides more in the fact that they constitute evidence of the subjective element – of acceptance or rejection – than in any strictly material function as precedent.[60]

104. The acts – not to mention behaviour, attitudes and conduct – of a State in relation to custom may be excluded from the category of strictly unilateral acts, since their effects amount to a kind of tacit international agreement. Although in addition to being unilateral in form only, they may appear to be autonomous, these acts generally produce effects when they coincide with other acts of a similar nature and so contribute to the formation of a customary rule. It should be noted, however, that an act forming part of the process of the creation of international custom is not necessarily excluded from the category of strictly unilateral acts if the act, independently of this function as a source of custom, reflects an autonomous substantive unilateral act creating a new juridical relationship; these are the basic conditions for classifying an act as strictly unilateral, as will be seen below.

105. Consideration also needs to be given to acts which constitute the exercise of a power granted by the provisions of a treaty or by a rule of customary law. An illustration would be the legal acts of a State concerning territorial questions, such as those adopted in relation to the delimitation of the exclusive economic zone or the limits of territorial waters, which are formal unilateral legal acts of internal origin which may produce effects at the international level. The Court, in the *Fisheries* case, stated that "[a]lthough it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law".[61]

106. These acts, although they appear to be strictly unilateral, are linked to a pre-existing international agreement or customary rule. Such acts do not produce legal effects except by virtue of a general rule of international law which establishes their conditions and modalities; the unilateral act is (in these cases) the condition for the application of a status or regime of international law.[62]

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[57] Guggenheim, op. cit. (*supra*, note 51), p. 111. Professor Rousseau cites various treaties which can serve as precedents, or constituent elements, of custom: op. cit. (*supra* note 25), pp. 334-337.

[58] See the following cases, among others: *The S.S. "Wimbledon"* (*P.C.I.J.*, Series A, No. 1, pp. 25-28: practice emanating from the international conventions on the Panama and Suez canals); *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder* (*P.C.I.J.*, Series A, No. 23, p. 27: reference to the Act of the Congress of Vienna of 1815); *Colombian-Peruvian Asylum Case, Judgment of November 20th, 1950* (*I.C.J. Reports 1950*, p. 277: reference to extradition treaties and the Montevideo Conventions of 1889, 1933 and 1939); *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3); and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986*, p. 14.

[59] In 1950, the International Law Commission, under article 24 of its Statute, considered the following sources of customary international law: texts of international instruments, decisions of national courts, decisions of international courts, national legislation, diplomatic correspondence, opinions of national legal advisers and the practice of international organizations. See *Yearbook ..., 1950*, vol. II, pp. 367-374.

[60] Suy, op. cit. (*supra* note 9), p. 245.

[61] *Fisheries case, Judgment of December 18th, 1951, I.C.J. Reports 1951*, p. 132.

[62] Reuter, loc. cit. (*supra* note 29), p. 576.

107. These acts, which create rights for the State which performs them, appear to create new obligations for third States, a situation that would be incompatible with the well-established principle of international law reflected in article 34 of the Vienna Convention on the Law of Treaties. In accordance with that article, treaties may not create obligations for a third State unless that State, as stipulated in article 35 of the Convention, expressly accepts the obligation in writing, reflecting the principle *pacta tertiis nec nocent nec prosunt*.

108. The obligation of the third State, which seems to flow from the right which the author of the unilateral act establishes, actually exists prior to the formulation of that act. These are therefore declarative acts which reflect the existence of pre-existing norms, whether under international agreements or under customary law, as in the case of the rules for the establishment of the exclusive economic zone, which, while being of customary origin, are contained in international instruments.

109. Reference to internal legal acts of States which have international effects leads us on to the consideration of internal legal acts which do not produce international effects and which therefore cannot be regarded as unilateral acts of States, even less as purely unilateral acts.

110. A State may, in exercise of its public functions, formulate internal unilateral legal acts which may have only an internal legal effect and never, except where they are in accordance with international law, international legal effects, such as those referred to above on the establishment of the exclusive economic zone of the State.

111. The exclusion of these acts from the scope of this report does not mean that they may not be quite significant in international law, especially in terms of its formation. Legislative acts relating to international matters – "internationally important internal law", in Triepel's terms – indicate the course of conduct to be adopted by the State vis-à-vis other States.[63]

112. National laws, such as those concerning nationality and maritime delimitation, may have an impact in the international sphere, in addition to their importance in relation to the formation of customary rules, as mentioned above.

113. State practice[64] and doctrine reflect an almost unanimous rejection of the extraterritorial application of internal legislation for the purpose of creating obligations for third States. On the other hand, it is not inadmissible for a State, through its internal legislation, to grant certain rights to another State or States. This would be consistent with

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[63] Rousseau, op. cit. (*supra* note 24), p. 331.

[64] The heads of State of the Permanent Mechanism for Consultation and Concerted Political Action – the Rio Group – meeting in Asunción on 23 and 24 August 1997, adopted a Declaration on Unilateral Measures, in which they state that:

> "We reject once again the unilateral and extraterritorial application of national laws as actions which violate the legal equality of States and the principles of respect for and dignity of national sovereignty and non-intervention in the internal affairs of other States, and which threaten coexistence between States ... Such measures as the Helms-Burton Act and recent efforts to broaden its scope, assessments of human rights situations, certification processes in combating drug trafficking, environmental criteria and attempts to make cooperation conditional on the voting patterns of countries in international bodies erode the relations of friendship and cooperation among States".

(A/52/347, annex IV, para. 2).

See also the opinion of the Inter-American Juridical Committee on the Helms-Burton Act, Organization of American States, document CJI/SO/II/doc.67/96, rev. 5.

an entirely voluntaristic approach which would not prevent a State from contracting an international obligation within the limitations imposed by international law.

114. In addition, there should be excluded from the scope of the current study those unilateral acts which produce legal effects only once the addressee State(s) accept the offer which is made to them through those acts. Simultaneous or successive unilateral declarations made with the intention of creating a legal act are covered by the law of treaties.

115. Another category of acts should be regarded in a similar way, namely, unilateral declarations formulated under article 36 of the Statute of the International Court of Justice, which are formal unilateral acts attributable to a single subject of international law.

116. These declarations, although they take the form of unilateral acts, give rise to a treaty relationship. The declaration provided for in article 36, paragraph 2, of the Statute of the Court produces effects only if a corresponding act has been performed. In such cases the unilateral engagement seems to be a substitute for an engagement under the law of international agreements. Rather than hold out the hope of combining in a single multilateral instrument all the potential claimants, the author State prefers to accept the Court's jurisdiction via an indeterminate number of unilateral engagements.[65] The legal relations stemming from an acceptance are contractual in nature. However, the methods used by States to accept the competence of the Court at times appear, because of their highly individualized character, to be intended to avoid a meeting of wills rather than to bring one about.[66]

117. The Court has concluded that such declarations are unilateral acts. In the *Phosphates in Morocco* case, it indicated that "the declaration, of which the ratification was deposited by the French Government ... is a unilateral act".[67] It also took this position in the *Norwegian Loans* case; however, while recognizing that the act in question was a unilateral act, it said in this case that it had jurisdiction only to the extent to which the declarations coincided in conferring such jurisdiction.[68] This indicates that the declarations in question should be looked at in the context of treaty law a position which is not shared in all the doctrine.[69]

118. In his dissenting opinion in the *Barcelona Traction, Light and Power Co. Limited (preliminary objections)* case, Judge Armand-Ugón stated that:

> "Il est exact que les déclarations étaient des actes unilatéraux, mais parce que ces actes s'adressaient à d'autres États, qui avaient accepté la même obligation, ils donnaient naissance à des accords conventionnels sur la juridiction, juridiquement équivalents à la clause de juridiction insérée dans un traité ou convention. La Cour, dans l'affaire du *Droit de passage*, a confirmé cette manière de voir:
>
> > «Le rapport contractuel entre les parties et la juridiction obligatoire de la Cour qui en découle sont établis de plein droit et sans convention spéciale de la déclaration.»
>
> "Ces déclarations ne pouvaient être modifiées sans le consentement des parties ... Elles avaient le même valeur et le même contenu juridique qu'une disposition d'un traité."[70]

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[65] Charpentier, loc. cit. (*supra* note 9), p. 369.

[66] Reuter, loc. cit. (*supra* note 29), p. 575.

[67] *Phosphates in Morocco (Preliminary Objections), P.C.I.J.*, Series A/B, No. 74, p. 23.

[68] *Case of Certain Norwegian Loans, Judgment of July 6th, 1957: I.C.J. Reports 1957*, pp. 23-24.

[69] Villagrán Kramer notes that "the coincidence of declarations does not establish an agreement between two States which have made unilateral declarations", loc. cit. (*supra* note 9), p. 141.

[70] *Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 135.

["It is true that the declarations were unilateral undertakings. But as those undertakings were addressed to other States, which had accepted the same obligation, they gave rise to agreements of a treaty character concerning jurisdiction which were legally equivalent to the jurisdictional clause embodied in a treaty or convention. The Court confirmed this view in the *Right of Passage* case:

> ["The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established '*ipso facto* and without special agreement'."

These declarations could not be modified without the consent of the parties ... They had the same force and the same legal content as a provision in a treaty."]

119. As the International Court of Justice noted in the *Nicaragua* case, these declarations, even though they are unilateral acts, establish bilateral engagements with other States which accept the same obligation of compulsory jurisdiction.[71] In this case, one of the parties, the United States of America, maintained that declarations under Article 36 were *sui generis* and that they were not treaties, neither were they governed by the law of treaties. In this same decision, the Court stated that declarations of acceptance of the compulsory jurisdiction of the Court are:

> "Facultative, unilateral engagements, that States are absolutely free to make or not to make. ... [T]he unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and contents of its solemn commitments as it pleases."[72]

120. Another category of acts which needs to be considered is that which is made up of unilateral acts of collective origin which are performed in respect of a third State and which confer benefits or impose obligations on that State if that State accepts them – something which it may do in any manner in the first case, but which, in the second case, it must do in written form, in accordance with the 1969 Vienna Convention.

121. An act of this type is a contractual act as between the States which are parties to it – that is, an "autonormative" act – but it is unilateral vis-à-vis a third party which did not participate in its formulation – that is, it is a heteronormative act insofar as that party is concerned.

122. It is well known that a third State cannot obtain rights or incur obligations under an agreement without its consent (*pacta tertiis nec nocent nec prosunt*), as is clearly stipulated in article 34 of the 1969 Vienna Convention. This had already been noted earlier in the jurisprudence. Thus, for example, in its decision in the *Upper Silesia* case, the Permanent Court declared that "un traité ne fait droit qu'entre les États qui y sont Parties"[73] ["a treaty only creates law as between the States which are parties to it"]. Similarly, in the award of the single arbitrator, Max Huber, in the *Island of Palmas* case, it was stated that the treaties which had been concluded between Spain and certain third States could not be binding upon the Netherlands, which was not party to them;[74] and, in the case of the *Free Zones*, the Permanent Court stated that "article 435 of the Treaty of Versailles is not binding upon

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[71] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para. 60.

[72] Ibid., para. 59. The contractual nature of declarations under Article 36 of the Statute is also reflected in the Court's decision in the *Anglo-Iranian Oil Co. Case, Judgment of July 22nd, 1952: I.C.J. Reports 1952*, p. 103.

[73] Loc. cit. (*supra* note 50), p. 29.

[74] *Island of Palmas*, United Nations, *Reports of International Arbitral Awards*, vol. II, p. 850. See also pp. 842 and 870.

Switzerland, who is not a party to that Treaty, except to the extent to which that country accepted it".[75]

123. The stipulation in favour of third parties (*stipulation pour autrui*) is a technique of domestic contract law whereby the parties to an agreement make a promise whose beneficiary is a third party.[76] It is an act which is contractual in origin, unilateral in form, but requires the acceptance of the beneficiary third State in order to be valid or to be revoked or modified.

124. Collateral agreements by means of which a legal relationship is established with a third State fall within the domain of treaties, both insofar as concerns the primary relationship which they create and when it comes to the relationship which they create with a third State. The difference between a unilateral legal act emanating from a contractual relationship and a purely unilateral act is that in the first case the acceptance of the third State is required, while in the second case such acceptance is not required. A stipulation in favour of a third party, as Jacqué notes, irrevocably binds its authors only after its acceptance by the beneficiary and its binding force derives from the principle *pacta sunt servanda*. In the second case, however, once it is clearly established that the parties intended to confer a right on a third party, acceptance by that third party ceases to be necessary.[77]

125. Another category of acts which is relevant to this report is that relating to declarations made by the agents of a State in the course of proceedings before an international tribunal. There is general agreement that such declarations are binding on the State in whose name they are made,[78] even if, from the point of view of its domestic law, they are *ultra vires* the executive arm of government.[79]

126. In the case of declarations made by agents of a State during the course of judicial proceedings, it might be maintained that, in addition to being binding, they are unilateral from the point of view of their form. However, these declarations do not seem to be truly autonomous, even though they may contain a promise, a waiver or a recognition; rather they should be placed within the context of the treaty which founds the jurisdiction of the tribunal concerned. Moreover, the obligations which a State may assume through such a declaration are related to the claim or legal position of the other State party to the proceedings, which makes it difficult to classify them as autonomous from this point of view.

127. Declarations made outside the framework of judicial proceedings but in relation to them are not similar to declarations formulated by agents of a State within that context. An example of such a declaration would be those made by the French authorities in the *Nuclear Tests* cases. Such declarations may or may not be strictly unilateral, depending on the intention of the State which formulates them.

128. Lastly, a comment should be made about declarations by a State (forgetting for the moment its conduct) which may enable another State to invoke an estoppel. There are undoubtedly important differences between unilateral acts or conduct which found an estoppel and strictly unilateral declarations. The International Court has considered estoppel

[75] *P.C.I.J.*, Series A/B, No. 46, p. 141.

[76] Nguyen Quoc, Daillier and Pellet, op. cit. (*supra* note 55), p. 243.

[77] Jacqué, loc. cit. (*supra* note 12), p. 332.

[78] See Rubin, "The International Legal Effects of Unilateral Declarations", *American Journal of International Law*, vol. 71 (1977), pp. 1-30. See also the cases of *Upper Silesia* (loc. cit. (*supra* note 50), p. 13), *Mavrommatis* (loc. cit. (*supra* note 50), p. 37) and *Free Zones* (loc. cit. (*supra* note 75), pp. 169-170).

[79] *Free Zones*, loc. cit. (*supra* note 75), p. 170.

on various occasions and, although it has on the whole recognized its existence in international law, it has attributed a different character to the acts which found it.

129. An act whereby a State creates an expectation in another State or States, on the basis of which that State or States take action to their detriment, is indeed a unilateral act of the State which performs it. Unlike a promise, however, whose obligatoriness, as we shall see, is based on the intention of the declarant State or the State which makes the promise, an act of this kind becomes binding upon the State which performs it, and so prevents it from acting in a different manner, when the third State takes action to its own detriment. As is well known, what is required is a situation which is created by the attitude of the State which is stopped: namely, conduct which follows on from and is directly based on its prior attitude. In such cases the State which has followed a certain course of conduct is not able to deny it or subsequently to express a contrary view.[80]

130. At various times, as has been noted, there have been cases in international jurisprudence of the invocation of an estoppel, as in the *Serbian Loans* case (in which the doctrine was explicitly mentioned, although it was declared not to apply on the facts);[81] in the *Eastern Greenland* case;[82] in the *Nottebohm* case;[83] in the *Nicaragua* case;[84] and in the *Gulf of Maine* case.[85]

131. The binding nature of the primary declaration of a State, which obliges it to follow a certain course of conduct, is not based, as in the case of a promise, on the actual declaration of intention by the State which formulates it, but on the secondary actions of a third State and on the detrimental consequences which would flow for that State from any change of attitude on the part of the declarant State, which generated an expectation in that other , third State. There is therefore a clear difference between declarations which may found an estoppel and declarations of a strictly unilateral nature.[86]

II. Strictly unilateral acts of States: criteria for their identification and legal basis for their binding character

A. Criteria for determining the strictly unilateral nature of international legal acts of States

132. The second part of this report will consider both the formal act which is the unilateral declaration and its content with a view to arriving at a definition of a specific category of international legal acts. The criteria that would seem to be useful in determining the strictly unilateral nature of this category of acts could be based on their form, on the one hand, or their content and effects, on the other.

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[80] E. Pecourt-García, "El Principio del Estoppel en Derecho Internacional Público", *Revista Española de Derecho Internacional*, vol. 14 (1962), p. 103.

[81] *Case concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J.*, Series A, Nos. 20/21, pp. 37-39.

[82] Loc. cit. (*supra* note 45), pp. 54-62.

[83] *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955*, pp. 17-20.

[84] Loc. cit. (*supra* note 71), paras. 48-51.

[85] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, paras. 126-154.

[86] Jacqué, loc. cit. (*supra* note 12), pp. 335ff.

1. In terms of form: a single expression of will

133. As accepted in most of the doctrine, a unilateral act should be understood as an act which is attributable to one or more States and which creates a new legal relationship with a third State which did not participate in its elaboration. More precisely, a unilateral act is an expression of will which is attributable to one or more subjects of international law, which is intended to produce legal effects and which does not depend for its effectiveness on any other legal act.[87]

134. The attribution of the act to the State or States which formulated it is of course governed by international law. It is understood, although this will be the subject of later reports, that only those representatives of a State who are capable of committing it at the international level may formulate a unilateral act that will be attributable and opposable to the State they represent. Not all officials of a State may commit the State, as is well recognized by international doctrine and jurisprudence.[88]

135. With regard to form, the doctrine generally considers that what is involved is a single expression of will on the part of one or more States. Unilateral acts may accordingly be classified as individual or collective. The fact that the act is a single expression of will does not mean that the subject of law that performs it is also single. To think otherwise would preclude recognition of the variety of strictly unilateral acts.[89] The fact that there is a single expression of will means that the author or authors are placed on the same side of the legal relationship to which the act gives rise. It also means that the elaboration of the act is attributable to them.

2. In terms of the autonomy of the act and of the obligation

136. However, the above-mentioned formal criterion is insufficient. The autonomy of the act is crucial to arriving at a definition of these specific legal acts in international law.

137. Some authors consider that the requirement of autonomy is no longer a necessary criterion for the delimitation of unilateral acts. They reject this criterion as being too imprecise, because its proponents do not agree among themselves on the list of unilateral acts which meet the requirement of autonomy.[90] The autonomy of the act, however, appears to be accepted by most authors as the determining criterion for identifying unilateral acts of States. The Secretariat appears to have shared this opinion when in its survey of international law of 1971, it suggested the advisability of drawing a distinction between dependent and independent acts.[91]

138. The autonomy of the act, however, should be looked at from two points of view, firstly in terms of the relationship of that act with another legal act or another expression of will, whether prior, simultaneous or subsequent. This criterion makes it possible to separate out and exclude the acts dealt with in the previous chapter. In such cases, as can be seen, what is involved is a treaty relationship, to which the existing rules of the law of treaties apply.

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[87] Jacqué, op. cit. (*supra* note 9), p. 384.

[88] In the *Gulf of Maine* case, the Court did not recognize the written statements of an official of the United States of America who did not have the necessary authority to commit that State; loc. cit. (*supra* note 85), para. 139. On the other hand, in the *Nuclear Tests* cases, the statements made by the President of the French Republic, the Minister for Foreign Affairs and the Minister of Defence were taken into account by the Court: loc. cit. (*supra* note 42), paras. 35-41, 49 and 51, and paras. 35-44, 51 and 53.

[89] Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", *Revue générale de droit international public*, vol. 83 (1979), p. 640.

[90] Nguyen Quoc, Daillier and Pellet, op. cit. (*supra* note 55), p. 355.

[91] *Yearbook ..., 1971*, vol. II (Part Two), p. 61, para. 282.

139. Secondly, the autonomy of the act should also be looked at from the point of view of the obligation to which it gives rise. As will be seen, this perspective is reflected in part of the doctrine and in the 1974 decisions of the International Court in the *Nuclear Tests* cases.

140. Review of the form and content of unilateral acts reveals the existence of a unilateral act and a unilateral obligation, in other words, the procedure or technique for establishing an international norm and the international legal norm itself, which, in this case, is an international obligation.

141. Although it is rare for a State to commit itself and to assume obligations without any quid pro quo, this is possible under international law, in accordance with the generally accepted principle that a State may, in the exercise of its free will and of the power of auto-limitation conferred on it by international law, contract unilateral obligations,[92] just as in internal law the promise of recompense is recognized in some legal systems.

142. The doctrine also accepts such a possibility. Thus, Guggenheim notes that use is made of the procedure for establishing juridical norms not just to create reciprocal obligations, but also to found unilateral international commitments.[93]

143. Insofar as its content is concerned, the unilateral act, in general, is a heteronormative act, this is, (distinguishing the norm from the formal act), the author State creates a new legal relationship with a third State which does not participate in the elaboration of the act.

144. Strictly unilateral legal acts, however, can create obligations only for the States which perform them.

145. There is no reason to deny that a unilateral promise may create an obligation for its author when it is manifestly made with that intention, although it is difficult, because of tacit acceptance, not to fall back into an explanation based on the assumption of an agreement resulting from acquiescence.[94] However, as some of the doctrine indicates, there appears to be no doubt that a State may assume international obligations vis-à-vis another State by making a public declaration which is not dependent for its validity upon any reciprocal undertaking or quid pro quo or upon any subsequent conduct implying its acceptance.[95]

146. A State which formulates a strictly unilateral legal promise certainly creates rights for a third State, reflecting the usual structure of a juridical norm. If the unilateral nature of the act is seen from this point of view, it is difficult to arrive at a definition of a strictly unilateral act, since there will always be one State which elaborates the act and (in most cases) contracts obligations and another which, without participating in its elaboration, acquires consequential rights.

147. In this connection it should be pointed out that the autonomy of the obligation is a possibility, as pointed out in a large part of the doctrine and international jurisprudence, especially in the above-mentioned Court decisions in the *Nuclear Tests* cases. A State may, then, according to this criterion, contract international obligations without any need for a third State to accept them or to act in a manner that might imply their acceptance as a condition of their legal validity. The Court is clear in this sense when it points out that:

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[92] The Permanent Court of International Justice, in the *Wimbledon* case, noted that "the right of entering into international engagements is an attribute of State sovereignty", loc. cit. (*supra* note 58), p. 25.

[93] Op. cit. (*supra* note 51), pp. 273-274.

[94] P. Reuter, *Droit international public* (3rd ed., 1968), p. 92.

[95] I. Brownlie, *Principles of Public International Law* (4th ed., 1990), p. 638.

> "nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to the effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made".[96]

148. The unilateral obligation contracted by the State depends, in addition, on its conformity with international law and the intention of the State carrying out the act. A strictly unilateral legal act may exist when the State has the intention of formulating it as such. The Court, in its decisions in the *Nuclear Tests* case, noted that:

> "[w]hen it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration".[97]

149. However, the question arises as to whether, by a declaration which contains a substantive act other than an undertaking, a State may contract unilateral obligations under conditions which are the same as those noted above and which apply to the case of an undertaking: that is, whether subsequent acceptance is not necessary for them to be effective either.

150. Renunciation and recognition, for example, formulated in a declaration, may contain autonomous obligations. Recognition may be based on an international agreement, involving a reply or an acceptance, but international law also grants it legal effects on its own account inasmuch as a State which has recognized a given claim or a given state of affairs cannot thereafter contest its legitimacy.

151. Without a doubt, qualifying the content of an act as strictly unilateral, that is, as containing an autonomous obligation, is a complex matter, as already mentioned. Here once again substantive unilateral acts give rise to problems. However, this should not affect the consideration of the declaration as a means or procedure for establishing norms, in particular unilateral obligations, nor should it affect the effort to codify the rules applicable to it.

B. Legal basis for the binding nature of strictly unilateral acts of States: development of a specific norm

152. Having accepted the existence of unilateral declarations and of strictly unilateral legal acts of States, we shall now try to establish the legal basis for their binding nature.

153. Just as, in the law of international agreements, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith", as stipulated in article 26 of the 1969 Vienna Convention, so a unilateral declaration is binding upon the State which formulates it by virtue of the same principle.

154. The principle *pacta sunt servanda*, which is the legal basis for the binding nature of treaties, is also at the basis of the international legal system. As some authors also remark, its existence is enshrined in the principles recognized by nations in their internal law.

155. In the case of unilateral acts in a broader sense, and having admitted that a declaration is the most usual procedure by which a State may create juridical norms, the possibility

[96] Loc. cit (*supra* note 42), para. 43.

[97] Ibid.

needs to be considered of developing a norm on which their binding nature might be based – although in the Sixth Committee debate in 1997, doubts were expressed as to whether the principle of good faith might serve to explain the juridical effects of unilateral acts or as a basis for the regime to which they are subject.[98]

156. Recognition of the principle of respect for promises, known as *pacta sunt servanda* in the law of treaties, is also applicable in the case of unilateral acts, although some authors, who place such acts in the context of the law of international agreements, consider that that fundamental norm would also apply to unilateral acts. The Court, in the *Nuclear Tests* cases, noted that "[j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declara on",[99] thus establishing an important parallelism between the law of treaties and the law of unilateral acts (in this case involving that form of substantive act which is a unilateral promise by a State, producing international legal effects).

157. When it considered the topic in 1996, the Commission alluded, in a reference to good faith, to the principle *acta sunt servanda*,[100] which could serve as a basis for the development of a more specific norm, such as *declaratio est servanda*. It is true that such a criterion might not be applicable to all unilateral declarations of States. As for promise, renunciation or recognition, there do not appear to be any major problems. However, the development of such a norm could raise doubts as to other substantive unilateral acts, such as protest. This, however, should not affect the possibility of developing such a norm, for it is not necessary for that norm to justify all unilateral acts. In this connection, it should be recalled that when the law of treaties was elaborated, not all international agreements were included, since the study was limited to treaties.

158. The decisions of 20 December 1974 in the *Nuclear Tests* cases are of considerable importance from the doctrinal point of view, because of their contribution to the general theory of sources and, more particularly, to the role of the general principle of good faith as a basis for the binding nature of certain unilateral acts.[101] Reference to this rule is not new as a specific principle of international law. The basic justification for the promise may also be good faith, as Venturini[102] and Reuter[103] maintain, that concept being understood as "[e]sprit de loyauté, de respect du droit, de fidelité aux engagements de la part de celui dont l'action est en cause" [a spirit of loyalty, respect for law and faithfulness to commitments on the part of the author of the action in question].[104] The International Court of Justice, in the *Nuclear Tests* cases, stated clearly that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith".[105]

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[98] See the statement by the representative of the Czech Republic, A/C.6/52/SR.23, para. 69.

[99] Loc. cit. (*supra* note 42), para. 46.

[100] See addendum 3 to annex II of the Report of the International Law Commission on the work of its forty-eighth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 345 (sect. 2 (a) (ii) of the general outline).

[101] De Visscher, loc. cit. (*supra* note 9), p. 461.

[102] Venturini, referring to "la bonne foi et ... la sécurité des rapports internationaux" [good faith and the security of international relations], says that "[C]'est à ce point de vue que se justifie le caractère obligatoire de la promesse unilaterale", [from this point of view, the binding nature of the unilateral promise is justified]; loc. cit. (*supra* note 9), p. 403.

[103] Reuter, op. cit. (*supra* note 93), p. 92.

[104] *Dictionnaire de la terminologie du droit international* (1960), p. 91 ("Bonne foi. bona fides.").

[105] Loc. cit., (*supra* note 42), paras. 46 and 49.

159. Without doubt, there exists a rule based on customary law which prescribes the obligation to keep promises:[106] "[l]a promesse unilatérale est un engagement international ... [qui] doit être exécutée en vertu du principe de la bonne foi" [the unilateral promise is an international commitment ... [which] should be honoured by virtue of the principle of good faith].[107]

160. The State which formulates the declaration is bound to fulfil the obligation which it assumes, not because of the potential juridical interest of the addressee but because of the intention of the State making the declaration. If it becomes necessary to determine whether an international obligation has been fulfilled, the judge will, rather than considering the acceptance of a third State, have recourse to the intention of the State which formulated the unilateral act, since therein lies the source of the obligation which, in such cases, as we have said, is unilateral, and which makes a formal unilateral act a strictly unilateral act.

161. The need to create greater confidence in international relations is another justification for the binding nature of unilateral declarations.

162. Necessary confidence in the relationships and expectations which are created by a State which formulates a declaration and assumes an engagement also found or justify the binding nature of that declaration. The binding nature of the unilateral obligation contracted through a declaration, based on the above-mentioned rules, allows the addressee State(s) to require its performance by the author State. The third State has placed its trust in the conduct or in the declaration constituting the unilateral act and in the author of that act not attempting to go back on its word. A more specific formulation of the general rule of good faith *contra factum proprium non concedit venire* should therefore determine the opposability of the unilateral act vis-à-vis its author.

III. Conclusions

163. A conclusion – at least a brief one – seems needed at the end of this first preliminary report on unilateral acts of States.

164. There is certainly an abundance of practice, doctrine and jurisprudence on the acts and conduct of States, although, as noted at the beginning of this report, they are not always consistent.

165. Most unilateral acts may be understood to fall within the realm of the law of international agreements. Others, though, may be understood to fall outside that sphere, so making necessary an effort at codifying and progressively developing the rules that govern their operation. Doubts are constantly raised as to the category of acts that might be the subject of this effort, as was indicated by some representatives in the Sixth Committee in 1997.[108]

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[106] Venturini, loc. cit. (*supra* note 9), p. 404. Note that some classical authors refer to the promise in general. The binding nature of the promise is not unknown in international law. Grotius, in his text *De Jure Belli ac Pacis* (Liber Secundus, Caput XI, para. XIV), says that "Ut ... promissio jus transferat, acceptatio ... requiritur". Puffendorf also states, in *Elementorum Jurisprudentiae Universalis* (Liber Primus, Definitio XII, para. 10), that "Requiritur ... ad promissum perfectum non solum voluntas promittentis, set etiam eius cui fit promissio".

[107] Guggenheim, op. cit. (*supra* note 51), p. 280.

[108] See the statements by the representatives of Austria (A/C.6/52/SR.23, para. 44), Israel (A/C.6/52/SR.24, para. 49), the United Kingdom (A/C.6/52/SR.19, para. 50) and the Czech Republic (A/C.6/52/SR.23, para. 68). The representative of Austria (loc. cit.) raised the question of whether the categories of acts enumerated in chapter III of the outline reformulated by the Working Group established by the

166. It may be deduced from a review of international practice, doctrine and jurisprudence that substantive unilateral acts are diverse in their nature and that they may be understood to fall within several categories at the same time, though it is also sometimes difficult to pin them down and place them in a specific category. Promise, renunciation, recognition and protest may be typical unilateral acts, but that does not mean that we are dealing with a determinate category of legal acts.

167. In the case of promise, in particular, it can be seen for example that a strictly unilateral promise should be distinguished from a promise made by a State in response to the request of another State; from a promise whose purpose is to obtain its acceptance by another State; and from a promise made on condition of reciprocity. In all these cases the promise ceases to be autonomous and becomes situated within a relationship based on the law of international agreements,[109] a possibility which the Court did not deny in its decisions in the *Nuclear Tests* cases, when it added "even though not made within the context of international negotiations".[110] Also, as indicated above, recognition and renunciation may be included in a relationship based on an international agreement.

168. To develop rules on substantive acts seems to be a difficult and uncertain exercise. On the other hand, the rules relating to a formal unilateral act which is performed with the intention of producing legal effects could apparently be the object of an attempt at codification and progressive development.

169. A unilateral declaration, in turn, cannot be considered in isolation; rather, its content should be examined thoroughly to determine if it really is a strictly unilateral act.

170. A strictly unilateral declaration may then be regarded as an autonomous expression of clear and unequivocal will, explicitly and publicly issued by a State, for the purpose of creating a juridical relationship – in particular, to create international obligations – between itself and a third State which did not participate in its elaboration, without it being necessary for this third State to accept it or subsequently behave in such a way as to signify such acceptance.

171. If it is concluded from the preceding review that it is possible to arrive at a definition of a unilateral declaration – which, as noted above, represents a process for the creation of legal norms, in the same way as is the treaty in the context of the law of international agreements – a future attempt could be made to codify the rules that would be applicable to it, without at the same time losing sight of the importance of an approach based on the progressive development of those rules.

Commission at its forty-ninth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), chap. IX.B.3) had enough elements in common to enable them to be treated alike or to be the object of the same legal regime.

[109] Skubiszweski, loc. cit. (*supra* note 9), paras. 43 and 46.

[110] Loc. cit. (*supra* note 42), paras. 43 and 46.